82-5444

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM LANAY HARVARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX TO APPENDIX

	PAGE
Opinion, Harvard v. State, 375 So.2d 2d 833 (Fla. 1978)	1a-4a
Opinion below, Harvard v. State, 414 So.2d 1032 (Fla. 1982)	5a-10a
Order of the Supreme Court of Florida, Denying Rehearing	11a
Section 921.141, Florida Statutes (1973)	12a-13a

William Lanay HARVARD, Appellant,

v.

STATE of Florida, Appellee.

No. 47052.

Supreme Court of Florida.

April 7, 1977.

Rehearing Denied Nov. 2, 1978.

Certiorari Denied May 14, 1979.
See 99 S.Ct. 2185.

Defendant was convicted before the Circuit Court, Brevard County, Robert B. McGregor, J., of murder in the first degree and was sentenced to death, and he appealed. The Supreme Court held that in a capital case it is for the court to evaluate anew the aggravating and mitigating circumstances to determine whether the death sentence is appropriate and that where defendant had previously been convicted of a felony involving violence against person, which conviction resulted from his attempted murder of one former wife, and instant prosecution was based on killing of another former wife by stalking her in the dark and then in cold blood killing her with shotgun at close range, there was sufficient aggravating circumstances to warrant imposition of the death penalty but that defendant was entitled to rebut certain information relied on by the court in imposing sentence.

Conviction affirmed and remanded for resentencing.

Boyd, J., concurred in part and dissented in part with an opinion.

Hatchett, J., concurred in part and dissented in part with an opinion.

1. Criminal Law ⇐1134(1)

When the death sentence is imposed, it is the responsibility of the Supreme Court to evaluate anew the aggravating and mitigating circumstances to determine whether such punishment is appropriate; the court must also insure that punishment for murder is evenly applied so that similar homicides draw similar penalties. West's F.S.A. Const. art. 5, § 3(b)(1); West's F.S.A. § 921.141(3).

2. Homicide ⇐354

Where defendant had previously been convicted of a felony involving violence against a person, which conviction resulted from his attempted murder of a former wife, and instant case involved killing of another former wife by stalking her in the dark and then in cold blood killing her with a shotgun at close range, there were sufficient aggravating circumstances to warrant imposition of the death penalty. West's F.S.A. § 921.141(3).

On Petition for Rehearing

3. Criminal Law ⇐1188

Where in imposing death sentence the trial court considered confidential portion of presentence investigation report and information furnished as to defendant's military record but neither was furnished to counsel for the State or defendant prior to sentencing, remand for resentencing was required, although without necessity of convening an advisory jury, with defendant entitled to opportunity to explain, contradict, etc., the materiality and import of the confidential information and military history. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, Bruce Zeidel and Craig S. Barnard and Jerry L. Schwarz, Asst. Public Defenders, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin and Michael H. Davidson, Asst. Attys. Gen., for appellee.

PER CURIAM.

This is an appeal from a conviction of murder in the first degree and a sentence of death. We have jurisdiction.[1]

Shortly after midnight on February 16, 1974, appellant William Lanay Harvard sat

1. Art. V, § 3(b)(1), Fla.Const.

in his car near Cocoa Beach and drank beer with a young friend, Ralph Baggett. A single-barrel, twelve-gauge shotgun lay in the back seat. Harvard had placed his car within view of the Sansqar Bar and was apparently waiting for his ex-wife Ann Bovard to leave the tavern. According to the testimony of Baggett, when Ann Bovard drove off alone in her car, appellant followed. They had driven in tandem for about eight miles when they approached the residential area in which the woman lived. Harvard ordered Baggett into the rear seat and pulled the shotgun into the front. For some reason, Ann Bovard slowed to a stop on the right shoulder of the road. With his right hand, Harvard placed the barrel of the shotgun in the open window of the passenger's door; with his left hand he steered the automobile tightly along the left side of Ann Bovard's car so that the weapon aimed directly at her throat. He yelled, "Bitch," and fired into her neck. Ann Bovard died of massive damage to the trachea, esophagus, right artery, and left jugular vein.

Harvard was indicted for murder in the first degree. At trial, the jury found him guilty as charged. In the separate sentence advisory proceeding, the jury recommended death.

The trial court ordered a presentence investigation. The trial judge, upon consideration of the report, the evidence presented at the trial and sentencing proceedings, determined that there were sufficient aggravating circumstances which outweighed the mitigating factors to justify the recommended sentence. The trial judge sentenced William Lanay Harvard to death, entering the formal judgment as required by Section 921.141(3), Florida Statutes. The judgment stated the facts on which the death sentence is based as follows:

"1. The capital felony in this case was especially heinous and atrocious in that the defendant had previously been married to the victim and a divorce had occurred and thereafter the defendant harassed and terrorized the victim by threatening her with harm and death without any provocation on the part of the victim. The accused premeditated and plotted her death and included in his plans provision for an alibi for himself; the defendant stalked the victim and pulled up beside her on a public street pointing a twelve gauge shotgun and discharging it at close range directly into the neck of the victim.

"2. The defendant has previously been married to another woman and on one occasion had assaulted that wife with a firearm knocking her to the ground and discharging a pistol into her head while standing over her; that first wife did not die, the defendant was convicted of Aggravated Assault.

"3. The defendant testified in the separate sentencing proceeding, and his attitude, appearance and demeanor was that of a person cold, calculating and without remorse."

Appellant urges reversal of his conviction of first degree murder on three grounds. First, he contends that there was insufficient evidence to support a finding of premeditation; second, he contends that it was reversible error for the trial court to refuse to instruct the jury on aggravated assault as a lesser included offense; and third, he contends that it was reversible error for the state to make certain remarks during the closing arguments. We have searched appellant's arguments for merit, but have found none. The conviction is affirmed.

[1] When the sentence of death has been imposed, it is this Court's responsibility to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate. *State v. Dixon*, 283 So.2d 1 (Fla. 1973). We must also ensure that punishment for murder is evenly applied so that similar homicides will draw similar penalties.

[2] The aggravating circumstances include the following. Appellant has previously been convicted of a felony involving violence against a person. That conviction resulted from appellant's attempted murder of another former wife. In that prior inci-

dent, the appellant forcibly entered the woman's home and, in front of the children, threw her to the floor, placed his right foot on her back, and fired a twenty-two pistol into her head. Miraculously, she lived.

In the instant case, appellant again demonstrated his propensity toward calculated homicide in the killing of Ann Bovard. The murder was the final, deliberate stroke in appellant's campaign of terror against his ex-wife. He sought her out in the early morning hours, stalked her in the dark, and then in cold blood killed her with a shotgun at close range.

The record discloses no mitigating factors recognized by the statute. The total circumstances established the murder as a cold-blooded execution. The jury and the judge both found the aggravating circumstances sufficient to warrant death. We agree.

The conviction and sentence are affirmed.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and ROBERTS (Retired), JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

HATCHETT, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring in part and dissenting in part.

I concur in affirmance of the conviction of the appellant, but dissent to imposition of the death penalty.

The law requires that similar punishment be given for similar crimes. Just as four members of the jury who voted against an advisory sentence of death, I feel application of the death penalty is inappropriate after weighing the aggravating and mitigating circumstances as required under Section 921.141, Florida Statutes. I would direct the trial court to enter a sentence of life imprisonment without consideration of parole for a minimum of twenty-five years.

HATCHETT, Justice, concurring in part and dissenting in part.

I join in affirmance of the conviction but dissent as to the imposition of the death penalty.

ORDER

Pursuant to the dictates of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court directed the trial judge who imposed the death sentence in this case to advise the Court whether he imposed the death sentence in consideration of any information not known to appellant. His response states that he considered a confidential portion of the pre-sentence investigation report, and information furnished by the United States Marine Corps as to the defendant's military record, attached to the confidential evaluation, and that neither was furnished to counsel for the state or the defendant prior to sentencing.

Before the trial judge responded to our *Gardner* order, counsel for appellant filed a petition for rehearing, alleging various matters relating to appellant's conviction and sentence, and application for *Gardner* relief. The state has filed a response to the petition for rehearing.

[3] On consideration of appellant's petition and the trial court's response to our *Gardner* order, and pursuant to the decision of the United States Supreme Court in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), rehearing is denied but the sentence of death in this cause is vacated. The case is remanded to the trial court for resentencing, without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military history, as well as other matters properly considered by the trial court concerning appellant's sentence under Section 921.141, Florida Statutes (1977).

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

William Lanay HARVARD, Appellant,

v.

STATE of Florida, Appellee.

No. 47052.

Supreme Court of Florida.

April 15, 1982.

Following remand for resentencing, 375 So.2d 833, the Circuit Court, Brevard County, Robert B. McGregor, J., reimposed the death sentence, and defendant appealed. The Supreme Court held that: (1) nine-month delay between announcement of sentence at conclusion of *Gardner* rehearing and issuance of written final judgment was not reversible error; (2) resentencing hearing was not required to be had before a new judge; (3) trial judge went beyond what was necessary in allowing defendant to present evidence in rebuttal of confidential information previously considered; and (4) defendant's lying in wait for and stalking former wife, compounded by prior harassment of her, constituted sufficient additional acts to justify application of the heinous, atrocious or cruel aggravating factor.

Affirmed.

Boyd, J., filed dissenting opinion.

1. Criminal Law ⇐996(3)

Nine-month delay between announcement of reimposition of death sentence at conclusion of *Gardner*-mandated resentencing and issuance of written final judgment did not demonstrate that the trial judge failed to properly weigh aggravating and mitigating factors and although there was no reversible error in manner in which the trial judge rendered his decision, announcement of the decision and filing of written findings should be done simultaneously. West's F.S.A. § 921.141.

2. Criminal Law ⇐996(3)

Gardner-mandated capital resentencing hearing was not required to be held before

a different judge as against contention that because original trial judge considered confidential matters in imposing the death sentence he could have been influenced thereby on resentencing. West's F.S.A. § 921.141.

3. Constitutional Law ⇐270(2)
Criminal Law ⇐996(3)

At *Gardner* mandated capital resentencing, i.e., resentencing required because the trial judge considered information which defendant had no opportunity to deny or explain, the trial judge did not erroneously limit presentation of evidence concerning events underlying an aggravated assault conviction which was used as a statutory aggravating circumstance in initial sentencing and defendant was not denied due process because of refusal to admit some portions of testimony offered by his former attorney relative to the assault conviction. West's F.S.A. § 921.141(5)(b); U.S.C.A.Const.Amend. 14.

4. Homicide ⇐354

Although former wife's death was almost instantaneous due to gunshot wound, defendant's lying in wait for and stalking his former wife, compounded by his previous harassment of her, constituted sufficient "additional acts" to justify application of the heinous, atrocious or cruel aggravating factor necessary for the death sentence. West's F.S.A. § 921.141(5)(h).

See publication Words and Phrases for other judicial constructions and definitions.

5. Homicide ⇐354

Aggravated assault conviction based on incident of violence to defendant's first wife's sister was a proper aggravating circumstance in imposing death sentence for fatal shooting of second ex-wife. West's F.S.A. § 921.141(5)(b).

6. Criminal Law ⇐996(3)

Matters which could have been raised on appeal resulting in affirmance of conviction could not be raised in subsequent proceedings on *Gardner* remand, i.e., remand for capital resentencing because the court had initially considered confidential information that was not revealed to the defendant. West's F.S.A. § 921.141.

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Chief Asst. Public Defender and Richard B. Greene, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for appellant.

Jim Smith, Atty. Gen. and James Dickson Crock, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is an appeal from a death sentence which was reimposed upon appellant after a resentencing hearing pursuant to an order of this Court contained in *Harvard v. State*, 375 So.2d 833, 835 (Fla.1978) (on rehearing). We have jurisdiction under article V, section 3(b)(1), Florida Constitution. We affirm.

To properly address the issues, it is necessary to establish chronologically the events culminating in this proceeding. Appellant was convicted in 1974 of first-degree murder for the shooting death of his second ex-wife, Ann Bovard. The facts of this murder, described in more detail in our original opinion, reflect that appellant waited in his automobile for Ms. Bovard to leave her place of employment, then followed her for some distance, pulled alongside her car, and discharged a shotgun blast into her neck, killing her instantly. The jury recommended the death penalty and the trial judge agreed, imposing the death sentence after concluding that no mitigating circumstances existed to outweigh the applicable aggravating circumstances.

While this case was pending on appeal before this Court, the United States Supreme Court, in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), decided that it is a denial of due process for the death sentence to be imposed if the trial judge, in weighing the aggravating and mitigating circumstances of the case, considers confidential information which the defendant had no opportunity to deny or explain. As a result of this U.S. Supreme Court decision, this Court di-

rected all trial judges in the state to advise the Court whether they had imposed the death sentence in consideration of any information not known to the defendants. The trial judge in the instant case responded that he had, in fact, considered a confidential portion of the presentence investigation report and information regarding appellant's military record, furnished by the United States Marine Corps, which had not been made available to appellant or his counsel.

We affirmed the conviction of appellant, but, to comply with the *Gardner* decision, we vacated the death sentence and remanded the case for resentencing, stating that the hearing would be

> without the necessity of convening an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information and military history, as well as other matters properly considered by the trial court concerning appellant's sentence. . . .

Harvard, 375 So.2d at 835. The trial judge proceeded in accordance with this direction and, at the conclusion of the resentencing proceeding, reimposed the death sentence. In this appeal, appellant argues that the *Gardner* remand resentencing procedure denied him due process of law.

[1] Appellant first attacks the procedures used by the trial judge in reimposing the death sentence, arguing that the nine-month delay between the announcement of the sentence at the conclusion of the hearing and the issuance of the written final judgment of resentencing demonstrates that the trial judge failed to properly weigh the aggravating and mitigating factors. We find no reversible error in the manner in which the trial judge rendered his decision, although we suggest that the announcement of the judge's decision and the filing of written findings should be done simultaneously. The judge reimposed the death sentence after considering all of the information available to him, including the evidence presented at resentencing. His conclusion that the death sentence was again appropriate clearly indicates that his finding is based upon the failure of the defense to present sufficient evidence at resentencing to rebut the information contained in the confidential portion of the presentence investigation report or in the military records. The written order expressly states that the defendant had failed to show harm or errors in the confidential matters considered in the original sentencing procedure. The evidence in this record not only confirms that finding, but it also reflects that the confidential information was primarily cumulative in light of the evidence actually presented at the original sentencing hearing. We find no error.

[2] The second error alleged by appellant is the trial judge's refusal to assign the resentencing hearing to a new judge. Appellant argues that because the original trial judge considered confidential material in imposing the first death sentence, he could have been influenced at resentencing by this improper information and by his prior ruling. We reject this argument. This case was remanded to comply with the rule announced in *Gardner*, and nothing in *Gardner* requires the assignment of a new judge to conduct the resentencing procedures. Furthermore, trial judges are routinely made aware of information which may not be properly considered in determining a cause. Our judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence. *Alford v. State*, 356 So.2d 108 (Fla.1977). The written judgment of resentencing in this case is detailed, logical, and fully supported by the record.

[3] Appellant next claims that, at resentencing, the trial judge erroneously placed limitations on his presentation of evidence concerning the events which resulted in his 1969 conviction of a felony involving violence to his first wife's sister. This conviction constitutes a statutory aggravating circumstance under section 921.141(5)(b), Florida Statutes (1979). At the original sen-

tencing hearing in 1974, the state presented evidence of the aggravated assault conviction, consisting of the testimony of the victims in the incident, Betty Ann Phillips (Harvard's first wife) and her sister, Mary Jane Sweat. Ms. Phillips described the attack in her 1974 testimony:

A Well, we arrived at the house and we walked in and I had noticed the kids' suitcase sitting in the hall and knew something was wrong and we both just looked at each other. About that time Mr. Harvard stepped out of the side closet and he had a small pistol in his hand and he looked at me and said, "I told you the next time you took me back to court I would kill you" and Mary—

Q Is that your sister?

A They started talking about his mother and I had talked to Mr. Harvard, too, about if I wanted us to go back together he would. Just by talking to him, I knew what he was there for, and they kept on, Mary, arguing about his mother, that he told her that she had called him and told her things that weren't true and Mary said she called his mother and told her about how he was acting. And that was all that she had said to his mother. And, about that time, Mr. Harvard moved his hand up and shot her right in the face and I had screamed and Mary took off for the front door and he shot her again, going out the door. And then I ran out the back door and, about that time, I was standing there beside the carport where I was and he pushed me down to the ground and I remember his foot going on my back and that is all I remember.

Q Were you shot?

A Yes, sir.

Q Where?

A On the top of the head.

This testimony is reflected in the original sentencing order and in the first opinion of this Court, although neither the state nor the appellant brought to the attention of the trial court or of this Court in the original appeal the fact that the offense to which appellant pleaded guilty was the assault against his sister-in-law rather than an assault against his first wife. The trial judge corrected that error in his findings on resentencing. In the 1974 hearing, appellant testified in his own behalf regarding the incident, characterizing the shootings as accidental. The confidential presentence investigation report also included a summary of the events surrounding the Jacksonville incident which is consistent with the testimony at the original sentencing hearing.

Appellant complains that he was denied due process in the second sentencing hearing because the trial judge refused to admit some portions of the testimony offered by appellant's former attorney relative to the 1969 proceeding. The record shows that the trial judge liberally allowed appellant to present considerable testimony and evidence concerning the assault charge. Appellant testified in his own behalf, was allowed to present the testimony of his former lawyer, and was also allowed to introduce an unauthenticated transcript of the 1969 preliminary hearing. In his testimony, appellant again principally disagreed with the characterization placed on these 1969 shootings by both victims' testimony and in the summary contained in the presentence investigation report. He admitted he shot his first wife and her sister, but excused his actions in part because of what he perceived as the misconduct of these women.

To a limited extent, the trial judge allowed appellant's 1969 attorney to testify concerning his recollection of the inconsistencies in the testimony presented by the first wife at the preliminary hearing in 1969 as compared to her testimony at the sentencing hearing in 1974. In his resentencing order, the trial judge directly addressed this asserted impeachment of the first wife's testimony in the 1974 sentencing proceeding, stating:

> Such impeachment should have been done at the time of trial and it therefore appears that this was a wrongful attempt to

belatedly impeach evidence presented by the State to the advisory jury. The Supreme Court's Remand was not for this purpose. As to the testimony contained in transcript of the proceedings of the probable cause hearing before the Justice of the Peace in Jacksonville in 1969, (more than five years earlier than the testimony of the former wife and the former sister-in-law during the bifurcated sentencing phase), this Court finds it to be substantially (and remarkably so for the passage of time involved) consistent and uncontradicting.

This Court's remand for resentencing was for the purpose of redressing a *Gardner* violation. Under our order, the trial judge was obligated to consider the evidence offered by appellant to explain, contradict, or rebut information which had been previously undisclosed to appellant or his counsel. We conclude that the trial judge went beyond what was necessary in allowing appellant a full opportunity to present evidence at the resentencing hearing in rebuttal of the confidential information previously considered; we find no error.

In his final assertion of error, appellant argues that the aggravating factors of heinous, atrocious, and cruel and of a previous conviction of a violent felony were improperly applied and that the trial judge failed to adequately consider mitigating circumstances. The conclusion that this murder was heinous, atrocious, and cruel was based upon the following analysis in the resentencing order:

> While the defendant and Ann Bovard had been divorced approximately two months, they had been separated for several months, and during the separation the defendant had engaged in a series of harassing actions. In addition, the defendant enclosed in a Christmas card he sent to Ann Bovard in December, 1973, a note saying, "You will never see Christmas." In January, 1974, after the divorce, the defendant told a coworker that he would "do anything to get her out of his hair." On the night of the killing, February 16, 1974, the defendant waited outside of his second former wife's place of employment, and when she left he followed her for approximately ten miles to the entrance of the subdivision in which Ann Bovard lived, where he pulled up close beside her apparently momentarily stopped vehicle and with a 12-gauge shotgun shot her in the neck with a shot shell loaded with pellets. The blast tore away a portion of her neck, and she apparently died almost instantly. Such activities (the waiting, the following, and the shooting from a car window) clearly demonstrates that this premeditated homicide was a calculated and cold blooded execution. Such killing was done without any provocation on the part of the victim.

[4] Appellant argues that this homicide was not especially heinous, atrocious, or cruel, as described in section 921.141(5)(h), Florida Statutes (1979), and as interpreted by this Court, principally because there was instantaneous death from gunshot wounds with no "additional acts as to set the crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). We agree with the trial judge, however, and find that appellant's lying in wait for and stalking of Ms. Bovard, compounded by appellant's previous harassment of her, constitute sufficient "additional acts" to justify application of the heinous, atrocious, or cruel aggravating factor.

[5] Appellant also claims that the second aggravating factor, the aggravated assault conviction, should not be used to support the death sentence under the circumstances of the incident as he relates them. Appellant was afforded a full opportunity at the resentencing hearing to present evidence about the incident, and he does acknowledge that he was convicted in 1969 of aggravated assault. This conviction clearly is a proper aggravating circumstance for the trial judge to consider. § 921.141(5)(b).

[6] We agree with the trial judge's conclusion that no mitigating circumstances

existed sufficient to outweigh the aggravating factors in this case and find that the reimposed sentence was based on reasoned judgment. *Holmes v. State*, 374 So.2d 944 (Fla.1979). *See also Palmes v. State*, 397 So.2d 648 (Fla.1981). Further, we reject appellant's attempt to seek review of issues in this proceeding which could have been raised in the 1977 appeal. The reimposition of the death sentence is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., dissents with an opinion.

BOYD, Justice, dissenting.

For the reasons I stated when this case was originally before the Court on appeal, *Harvard v. State*, 375 So.2d 833, 835 (Fla. 1977), I dissent to the affirmance of the sentence of death and would direct that appellant be sentenced to life imprisonment without eligibility for parole for twenty-five years.

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JUNE 22, 1982

WILLIAM LANAY HARVARD,	**	
Appellant,	**	CASE NO. 47,052
vs.	**	Circuit Court Case No. 74-173-CF-A (Brevard)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., Concur
BOYD, J., Dissents

The Application for Stay of Judgment and Mandate filed by attorney for appellant is granted and the proceedings in this Court and the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida, are hereby stayed to and including July 22, 1982, to allow appellant to seek review in the United States Supreme Court and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Casseaux
Deputy Clerk

cc: Hon. Raymond C. Winstead, Jr., Clerk
Hon. Robert B. McGregor, Judge

Craig S. Barnard, Esquire
Richard B. Martell, Esquire

CHAPTER 921
SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60

days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—[illegible]

*Note.—Bracketed word inserted by the editors.

Note.—See former [illegible].